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No. 00-593

Supreme Court, U.S.
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Supreme Court of the United States

PUBLIC SERVICE COMMISSION OF UTAH, STEPHEN F. MECHAM, CONSTANCE B. WHITE, and CLARK D. JONES, COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF UTAH,

Petitioners,

v.

QWEST CORPORATION, MCI WORLDCOM NETWORK SERVICES, INC., MCIMETRO ACCESS TRANSMISSION SERVICES, INC. and AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent MCI WORLDCOM Network Services, Inc., states as follows:

On May 7, 1999, MCI Telecommunications Corporation changed its name to MCI WORLDCOM Network Services, Inc. MCImetro Access Transmission Services, Inc. is a wholly owned subsidiary of MCI WORLDCOM Network Services, Inc. MCI WORLDCOM Network Services, Inc. is a wholly owned subsidiary of MCI Communications Corporation which, in turn, is a wholly owned subsidiary of WorldCom, Inc. WorldCom, Inc., through its wholly owned subsidiaries, provides local and long-distance telecommunications services domestically and internationally.

WorldCom, Inc. is a publicly traded company on the Nasdaq National Market under the symbol "WCOM". No publicly held company owns ten percent or more of WorldCom stock.

Pursuant to Rule 29.6, respondent Qwest Corporation states as follows:

U S WEST, Inc. merged with and into Qwest Communications International Inc. on June 30, 2000. Qwest Communications International Inc. is a publicly held corporation that has no parent company. Qwest Communications International Inc., through its operating subsidiaries, provides broadband Internet-based data, voice and image communications for businesses and consumers. No publicly held company owns ten percent or more of the stock of Qwest Communications International Inc.

U S WEST, Inc. was formerly the parent and sole shareholder of U S WEST Communications, Inc. U S WEST Communications, Inc. was renamed Qwest Corporation on July 6, 2000. Qwest Corporation is a wholly owned subsidiary of Qwest Communications International Inc. Qwest Corporation is a local exchange carrier that provides local exchange telecommunications, exchange access, information access, data services, wireless services and intraLATA long distance services pursuant to tariff and contract.

Pursuant to Rule 29.6, respondent AT&T Communications of the Mountain States states as follows:

AT&T Corp. is the parent of AT&T Communications of the Mountain States, and no other publicly held corporation owns ten percent of its stock.

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STATEMENT

Petitioners – the Public Service Commission of Utah and the members of that Commission – ask this Court to grant *review to determine the validity, under the Eleventh* Amendment, of a provision of the Telecommunications Act of 1996[1/] ("the Act" or "the 1996 Act") authorizing suits in federal court against state public utility commissions. Specifically, the Act provides that if state commissions agree to participate in the administration of a new federal scheme governing "interconnection" arrangements among competing local phone companies, their actions may be reviewed for compliance with the Act in federal district court. Petitioners did choose to participate in the Act's regulatory scheme, but then asserted an Eleventh Amendment defense to one of two ensuing federal lawsuits. The Tenth Circuit, in a ruling consistent with other circuit decisions interpreting the Act, affirmed the rejection of the Eleventh Amendment immunity claim, relying both on waiver and on the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

1. Statutory Scheme. The 1996 Act fundamentally altered the balance between federal and state authority in telecommunications regulation. As part of a broad effort to promote competition wherever possible, Congress partially supplanted the existing system of state regulation of local service by imposing a new set of federal standards and procedures governing "interconnection" between incumbent local exchange carriers and potential competitors. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73 (1999).

In the Act, Congress preempted all state laws erecting barriers to entry into telecommunications markets. § 253(a). Then Congress created three specified routes for competitive

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[1] Codified at 47 U.S.C. § 157 *et seq.*

entry into local telephone markets to speed the introduction of competition. First, the Act requires incumbent local carriers to "interconnect" their networks with those of new entrants, thereby enabling subscribers connected to different networks to call each other. § 251(c)(2). Second, the Act requires incumbents to lease elements of their networks to new entrants on an unbundled basis. § 251(c)(3). Third, the Act requires incumbents to sell new entrants complete services on a wholesale basis for resale to retail customers. § 251(c)(4). In each case, Congress prescribed specific federal standards governing the rates that the respective carriers charge each other for these services. §§ 251(c)(2)-(4), 252(d); *AT&T Corp.*, 525 U.S. at 371-73. Congress vested the Federal Communications Commission ("FCC") with the authority to make general rules and regulations to implement the substantive federal standards the Act established. 525 U.S. at 377-84 & n.5; § 201(b).

In the spirit of cooperative federalism, however, Congress also carved out a new, voluntary role for states. The Act requires incumbent local carriers to negotiate with new entrants to develop "interconnection agreements" specifying the terms of interconnection, access to network elements, and resale. § 251(c)(1). If the parties cannot arrive at a complete interconnection agreement through negotiation, however, the Act gives state utility commissions the authority (if they choose to exercise it) to convene compulsory "arbitrations" to set terms by applying the substantive provisions of the Act and the FCC's regulations. § 252(b), (c). Whether negotiated or arbitrated, the final interconnection agreement must be reviewed for compliance with the Act – with the state commissions playing that role as well if they choose to do so. § 252(e)(1).

The Act does not require state commissions to implement the new federal scheme. If a state commission declines to exercise the authority Congress offered to it in the Act, the FCC will assume those duties. § 252(e)(5). Whether carried out by the FCC or a state commission, however, final agency determinations regarding the terms of an interconnection agreement are subject to review in federal court for compliance with the Act. Determinations of the FCC are reviewed by a federal court of appeals under the Hobbs Act, 28 U.S.C. § 2342(1). If a state commission elects to participate in the Act's implementation, "any party aggrieved . . . may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section[s] 251 and" 252. § 252(e)(6). Moreover, the Act expressly precludes any state court review of state commission actions "approving or rejecting" interconnection agreements. § 252(e)(4). Accordingly, section 252(e)(6), reinforced by section 252(e)(4), clearly puts state commissions on notice that their actions in arbitrating disputes and approving interconnection agreements will be reviewable in federal court.

2. *Arbitration Proceedings.* In 1996, AT&T Communications of the Mountain States ("AT&T") and MCI WORLDCOM Network Services, Inc. (formerly known as MCI Telecommunications Corp.) and MCImetro Access Transmission Services, Inc. (collectively, "MCI") each sought negotiation of the terms of separate interconnection agreements with Qwest Corporation ("Qwest") (formerly known as U S WEST Communications, Inc. or U S WEST). Both sets of negotiations reached an impasse.

Pursuant to section 252(b) of the Act, AT&T and MCI filed separate petitions with the Utah Public Service Commission ("PSC") in which they requested that the PSC

arbitrate the issues in dispute between them and Qwest. The PSC accepted and consolidated the petitions, and issued an arbitration order in which it resolved a number of open issues. After the parties filed fully executed interconnection agreements with the PSC, the PSC approved the interconnection agreements pursuant to § 252(e).

3. *District Court Proceedings*. Shortly after the PSC approved the interconnection agreements, MCI filed suit against Qwest and the PSC, alleging that it was aggrieved by several of the terms of the agreement between MCI and Qwest. At the same time, Qwest sued MCI, AT&T, and the PSC, challenging other provisions of its agreements with MCI and AT&T. In addition to challenging the interconnection agreement under the Act, the Qwest complaint included allegations that the PSC defendants had committed a violation of procedural due process and that the agreement would result in an unconstitutional taking. Qwest sought only declaratory and injunctive relief under all of its claims, including its constitutional claims. The district court consolidated the two suits, and the United States intervened.

Before the cases proceeded to an adjudication of the merits, the PSC defendants moved to have themselves dismissed from the case brought by Qwest on the ground that, under the Eleventh Amendment, the district court lacked jurisdiction over them. Significantly, however, the PSC defendants stipulated to the court's jurisdiction over them with respect to MCI's claims and therefore did not move to have themselves dismissed from the case brought by MCI. Pet. at 15. Petitioners explained this apparent inconsistency during the briefing of their immunity motion, stating that MCI had been willing to agree to limit the relief it sought to prospective relief, whereas Qwest's complaint, with its constitutional claims,

appeared to contemplate monetary relief. Reply Brief of Utah Public Service Commission and Individual Commissioners, at 2-3 (D. Utah filed April 9, 1999) ("As evidenced by the stipulation entered into by MCI and the Commission . . . , the Commission is certainly willing to proceed before this Court and have this Court fulfill its 47 U.S.C. § 252 review . . . when the State is not exposed to damages awards."). The PSC defendants also said that they did not object to an *Ex parte Young* action being brought by Qwest, because such an action "functionally achieves what the Commission believes this Court should do under a Section 252 review" and "would not expose the State to damage awards." *Id.* at 5. Although Qwest pointed out in its briefing and at oral argument that it was not seeking monetary relief, *see, e.g.*, U S WEST's Opposition to Supplemental Memorandum of the PSC and Individual Commissioners at 11 & n.6, petitioners continued to assert immunity under the Eleventh Amendment. It was only in later filings in the district court that they voiced any objection to lawsuits in federal court under section 252(e)(6) seeking prospective relief.

After the completion of extensive briefing, the district court determined that it had jurisdiction over the PSC defendants with respect to Qwest's claims and, on September 20, 1999, entered an order denying their motion to dismiss. Pet. App. 45a-58a. The court ruled that the individual Commissioners are subject to its jurisdiction pursuant to *Ex parte Young*, 209 U.S. 123 (1908), Pet. App. 51a-53a, and that the PSC had voluntarily waived its sovereign immunity in exchange for the right to participate in the administration of the Act. *Id.* at 54a-56a.

4. *Court of Appeals Decision.* The U.S. Court of Appeals for the Tenth Circuit affirmed the district court on both

grounds. First, relying on this Court's decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Tenth Circuit held that, while Congress could not abrogate Utah's sovereign immunity, Pet. App. 19a-20a, Utah consented to being subject to suit in federal court when it voluntarily chose to participate in the Act's regulatory scheme, Pet. App. 33a-34a ("[Section] 252 puts Utah on notice that Congress intends to subject it to suits brought by individuals if it acts under § 252") (citing *College Savings*, 527 U.S. at 679-80). The Tenth Circuit explained that, rather than constituting an "exclusion from an otherwise lawful activity," this case involved a *gratuity* – participation in the Act's regulatory scheme – that Congress granted to states expressly conditioned on their willingness to consent to suit in federal court. Pet. App. 36a. The court rejected the PSC defendants' argument that the regulation of utilities is a police power traditionally reserved to the states because "the 1996 Act preempted state regulatory authority over some aspects of local phone service" pursuant to Congress's Article I powers. *Id.* at 35a (citing *AT&T Corp.*, 525 U.S. at 370 n.6). Indeed, the court noted, "Congress could have preempted *all* state regulation of local phone service" if it had chosen to do so. Pet. App. 35a (emphasis added).

Second, the Tenth Circuit held that the suit filed by Qwest was a proper *Ex parte Young* action, and that nothing in the Act precluded invocation of *Ex parte Young* as a basis for federal court review of the PSC's approval of the interconnection agreements at issue here.[2] *Id.* at 39a. It agreed with the Sixth

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[2] The Tenth Circuit rejected the PSC defendants' argument that the district court improperly rejected its motion to dismiss Qwest's takings claim as unripe. Pet. App. 42a. The panel "[found] no indication in the record that defendants made this argument to the district court. Moreover,

Circuit's statement in *Michigan Bell Telephone Co. v. Climax Telephone Co.*, 202 F.3d 862, 867 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 54 (2000), that a lawsuit challenging a state commission's approval of an interconnection agreement is "a straightforward *Ex parte Young*" action, Pet. App. 39a. Noting that Qwest was simply seeking "declaratory and injunctive relief" from alleged "violations of federal law" by the defendant state officials, Pet. App. 40a n.8, the court summarily rejected the PSC defendants' contentions that either *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), or *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), imposed limitations on *Ex parte Young* that are relevant in this context, Pet. App. 39a-41a.

REASONS FOR DENYING THE PETITION

There are no conflicts among the circuits on any of the questions presented, and petitioners identify no independent reason justifying this Court's review. First, the Tenth Circuit's ruling on the *Ex parte Young* question is plainly correct, utterly uncertworthy, and fully dispositive -- at least as a practical matter -- of the issues raised here. Three circuits have now held that a lawsuit challenging approval of an interconnection agreement is properly brought against state public utility commissioners in federal court pursuant to *Ex parte Young* because (1) such a suit seeks prospective relief from an ongoing violation of federal law, and (2) nothing in the Act precludes reliance on *Ex parte Young*. There is no circuit split on this issue, and the cursory arguments against application of *Ex parte*

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the district court did not discuss ripeness in its memorandum order denying defendants' motion to dismiss." *Id.* The PSC has not sought review of this issue.

Young offered in the petition suggest no reason to second-guess the prevailing consensus.

Because this case could properly be brought under *Ex parte Young*, it follows that a decision by the Court on the two other questions presented by petitioner will have no practical impact on any party. At the most, a ruling that the Public Service Commission did not validly waive the Eleventh Amendment would require amendment of the caption of the case to limit the defendants to the commissioners in their official capacity. Given the Court's oft-expressed reluctance to review abstract issues of law, particularly where, as here, it will have no practical effect, this fact alone would be a sufficient basis to deny review altogether. *See, e.g., The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

In any event, on their own terms, the waiver-related questions presented are not worthy of review. Petitioners claim that the federal courts are in disarray on the question whether, under the standards established in *College Savings*, states consent to review in federal court when they voluntarily participate in administering the 1996 Act's regulatory scheme. In fact, the only two circuit court rulings that have decided the issue – the ruling below and a ruling of the Seventh Circuit – have held that states do consent to federal jurisdiction, and thereby waive their immunity, by choosing to participate in the Act's scheme with clear notice that their choice will subject them to federal judicial review. Moreover, those rulings are fully consistent with *College Savings*; it is well within Congress's power to preempt state regulation of interstate commerce and then condition the states' voluntary participation in the new federal regulatory regime on consent to federal court review and a waiver of the Eleventh Amendment. But even if that were not so clearly the case, review still would not be

warranted. The Court's practice, "borne out time and again in [its] decisions to grant and deny certiorari, is that ordinarily a court of appeals decision interpreting one of our precedents – even one deemed arguably inconsistent with it – will not be reviewed unless it conflicts with a decision of another court of appeals." *Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting, joined by O'Connor, J., and Souter, J.).

I. The Tenth Circuit's Reliance on *Ex parte Young* Does Not Warrant Review.

Petitioners' arguments for review by this Court are severely undermined by their inability to make a plausible case for review of the *Ex parte Young* issue set forth in the third Question Presented. The reality is that three circuits are now on record holding that a case like this one is a "straightforward *Ex parte Young* case." *Michigan Bell Telephone Co. v. Climax Telephone Co.*, 202 F.3d at 867; *see* Pet. App. 39a (case below); *MCI Telecommuncations Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323, 346 (7th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3297 (U.S. Oct. 23, 2000) (No. 00-653).[3] As those courts have recognized, there is no basis for

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[3] In addition, the vast majority of district courts – over two dozen – that have ruled on this question have found that the Eleventh Amendment is not a bar to an *Ex parte Young* action commenced pursuant to § 252(e)(6). *See, e.g., Bell Atlantic-Pennsylvania, Inc., v. Pennsylvania Pub. Util. Communications*, 107 F. Supp. 2d 653 (E.D. Pa. 2000); *AT&T Communications. of the Southwest, Inc. v. Southwestern Bell Tel. Co.*, 86 F. Supp. 2d 932 (W.D. Mo. 1999); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); *Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc.*, 77 F. Supp. 2d 492 (D. Del. 1999); *U S WEST Communications, Inc. v. Serna*, No. Civ 97-124, 1998 U.S. Dist. LEXIS 23024 (D.N.M. Mar. 31, 1998); *AT&T Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc.*, 60 F. Supp. 2d 1279 (N.D. Fla.

petitioners' argument that *Seminole Tribe* somehow precludes reliance on *Ex parte Young* here because of some supposed inconsistency between *Ex parte Young* and the language of 252(e)(6). Given the weakness of that argument, and the prevailing unanimity among the circuits, it is not surprising that the Court has twice denied review on this precise question during this Term.[4] There is no reason to change course now.

The Court has recently recognized that *Ex parte Young* is an "essential part of our sovereign immunity doctrine." *Alden v. Maine*, 527 U.S. 706, 748 (1999). Under the *Ex parte Young* rule, a lawsuit in federal court against state officials, seeking prospective relief from ongoing violations of federal law, is not treated as implicating a state's immunity under the Eleventh Amendment. *See Coeur d'Alene*, 521 U.S. at 269; *id.* at 294 (O'Connor, J., concurring); *id.* at 298 (Souter, J., dissenting). These standards are plainly met here. Indeed, this Court has often recognized that *Ex parte Young* provides a proper vehicle for federal-court review of state commission decisions. *E.g., Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 344 n.4 (1951) (referring to the "many cases prior to and following *Ex parte Young* . . . in which this Court has granted . . . relief"); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 230-31 (1908).

1997); *GTE Fla., Inc. v. Clark*, 60 F. Supp. 2d 1277 (N.D. Fla. 1997); *U S WEST Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or. 1998); *U S WEST Communications, Inc. v. TCG Seattle*, 971 F. Supp. 1365 (W.D. Wash. 1997); *U S WEST Communications, Inc. v. Reinbold*, Civil No. A1-97-25, 1997 U.S. Dist. LEXIS 22606 (D.N.D. July 28, 1997).

[4] *Strand v. Michigan Bell Tel.* (cert. denied Oct. 2, 2000); *Strand v. Verizon North*, 121 S. Ct. 389 (cert. denied Oct. 30, 2000).

Thus, petitioners are left with the option of trying to make this case look like *Seminole Tribe*. In fact, however, there is nothing in the 1996 Act that would suggest that reliance on *Ex parte Young* is somehow precluded. Section 252(e)(6) simply authorizes an aggrieved party to bring an action in federal court to "determine whether [an interconnection] agreement or statement [approved or rejected by a state commission or the FCC] meets the requirements of section[s] 251" and 252. § 252(e)(6). That section raises none of the concerns presented in *Seminole Tribe*.

In *Seminole Tribe*, the Court reviewed the "carefully crafted and intricate remedial scheme" of the Indian Gaming Regulatory Act ("IGRA") in which "Congress intended . . . not only to define, but also to limit significantly, the duty imposed" on federal courts by the statute. 517 U.S. at 73-74. The Court found that the IGRA was unique insofar as it prescribed a very formal and intricate mediation scheme in which federal district courts play an extremely limited part. *Id.* at 75. For example, although the IGRA authorized federal courts to order a state to negotiate in good faith, it implicitly prohibited a court from enforcing its own order with contempt sanctions, as it normally would have the power to do. *Id.* at 74-75. Thus, the *Seminole Tribe* Court saw a clear inconsistency between the limited remedies available under IGRA and an *Ex parte Young* action, where the typical remedy is an injunction and contempt sanctions are available.

Here, nothing in section 252 of the Act limits federal court review in a remotely comparable manner. *See MCI Telecommunications Corp.*, 222 F.3d at 346. In fact, allowing *Ex parte Young* suits to proceed pursuant to section 252(e) only realizes Congress's intent to vest federal courts with jurisdiction to address ongoing violations of federal law by state

officials. Indeed, unlike the IGRA, the Act does not prohibit courts from ordering any equitable remedies. Absent an express limitation, federal courts "presume the availability of all appropriate remedies" under a federal statute. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992).

Seminole Tribe also held that IGRA specifically requires that "the state" be named as the defendant in any lawsuit under that statute, and that no individual state officer or group of officers, if sued in their official capacities under *Ex parte Young*, would be functionally equivalent to "the state" for purposes of carrying out its duties under IGRA. 517 U.S. at 75 n.17. The Court saw this as further confirmation that Congress contemplated suits against states and not *Ex parte Young* actions against individual state officers. *Id.* at 75-76 & n.17.

Here, by contrast, the Act does not require that actions be brought against "the state," or contain any language suggesting an intent to preclude suits against the commissioners; it simply provides for "Review Of State Commission Actions." Because *Ex parte Young* is the traditional mechanism for such review in federal court, the natural inference from the statutory text is that Congress intended for such suits to be brought on that basis. Moreover, the term "state commission" is defined in the Act to include any "commission, board, or official (by whatever name designated)" exercising jurisdiction over intrastate operations of carriers. § 153(41). Contrary to petitioners' claims, Pet. at 28-29, that definition is certainly broad enough to include the Commissioners, sued in their official capacity, who are the proper defendants in an *Ex parte Young* action.

In sum, there is no reason for the Court to second-guess the Tenth Circuit's reliance on *Ex parte Young*.[5] That, in turn, is by itself a sufficient reason to deny review on all the questions presented in this case. Where a case can be decided on a ground that is relatively simple and non-controversial, this Court's practice is not to reach out and address additional issues presented by the petitioner or discussed in the lower courts, particularly if they would not affect the outcome of the case. *See, e.g., The Monrosa*, 359 U.S. at 184 ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution [of the question before it] can await a day when the issue is posed less abstractly.").[6] *See generally* Robert L. Stern, *et al.*, SUPREME COURT PRACTICE, § 4.4, 172-73 (7th ed. 1993) ("If it appears that upon a grant of certiorari the Supreme Court might be able to decide the case on another ground and thus not reach the point upon which there is conflict, the conflict itself may not be sufficient reason for granting review.") (cases cited). Here, the *only* impact of a reversal as to questions 2 and 3 would be to require deletion from the caption of the Utah Commission as a

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[5] Petitioners also refer to dicta in *Coeur d'Alene* to assert that this Court has "cautioned against" applying *Ex parte Young* to cases like this one. Pet. at 29. However, the Court there recognized that the "*Young* exception" has been "an important part of [its] jurisprudence," 521 U.S. at 269, and that the circumstance before it was "unusual" because the relief that the plaintiff Tribe sought was akin to "a quiet title action which implicated special sovereignty interests," *id.* at 281.

[6] In *The Monrosa*, the Court granted review to address the enforceability of a forum selection clause in a bill of lading. Having determined, however, that the case could be resolved on the alternative ground that the clause at issue did not cover actions *in rem*, the Court declined to address the enforceability issue. 359 U.S. at 184.

body, as the case then proceeded against the Commissioners under *Ex parte Young*. For that reason, the Court should decline to review these issues, which would remain purely "academic" -- at least as a practical matter -- unless and until the Court also overturned the Tenth Circuit's *Ex parte Young* ruling.

II. The Waiver Issue, Even On Its Own, Does Not Warrant Review.

Even if the issue were squarely presented here in a non-abstract way, there would be no persuasive reason for the Court to review the Tenth Circuit's ruling that state commissions consent to suit in federal court when they choose to review interconnection agreements under the Act. Here again, although petitioners claim that the federal courts are in disarray on this question, the Seventh Circuit – the only other court of appeals to have addressed the question – is in agreement with the Tenth Circuit. *MCI Telecommunications Corp.*, 222 F.3d at 345.[7]

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[7] Petitioners cite only two rulings of courts of appeals in support of their claim of disarray on this issue. Pet. at 17. The first, *Chavez v. Arte Publico Press*, 157 F.3d 282 (5th Cir. 1998), was later modified to account for *College Savings*, *see* 204 F.3d 601 (5th Cir. 1998), and did not involve the Telecommunications Act or any comparable federal program in which Congress invited state participation. Instead, the Fifth Circuit dealt with the question of states' authority to *abrogate* Eleventh Amendment immunity under the Fourteenth Amendment. In the second case, *GTE North, Inc. v. Strand*, 209 F.2d 909 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 380 (2000), the only reference to the Eleventh Amendment is pure and acknowledged dicta in a footnote. *See id.* at 922 n.6. The state commission, as a corporate entity, was not even a defendant in *Strand* and the Sixth Circuit determined that the waiver issue was not presented because *Ex parte Young* applied.

Moreover, both circuits have faithfully followed this Court's teachings in *College Savings*.[8]

In *College Savings*, the Court recognized that Eleventh Amendment immunity may be waived, but it emphasized that

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[8] As with *Ex parte Young*, the vast majority of district courts that have ruled on the waiver question have held that states consent to suit in federal court when they voluntarily participate in the Act's regulatory scheme. *See, e.g., Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Pub. Util. Comm'n*, 107 F. Supp. 2d 653 (E.D. Pa. 2000); *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co.*, 86 F. Supp. 2d 932 (W.D. Mo. 1999); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); *Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc.*, 77 F. Supp. 2d 492 (D. Del. 1999); *U S WEST Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or. 1998); *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 9 F. Supp. 2d 766 (E.D. Ky. 1998); *U S West Communications, Inc. v. TCG Seattle*, 971 F. Supp. 1365 (W.D. Wash. 1997); *U S West Communications, Inc. v. Reinbold*, Civil No. A1-97-25, 1997 U.S. Dist. LEXIS 22606 (D.N.D. July 28, 1997).

Petitioners cite three district court opinions to support their claim that the courts are divided on this question. Pet. at 18 (citing *Wisconsin Bell v. Public Service Comm'n of Wisconsin*, 57 F. Supp. 2d 710 (W.D. Wis. 1999); *Bell Atlantic-Maryland v. MFS Intelenet of Maryland, Inc.*, Civil No. 599-2061, 1999 U.S. Dist. LEXIS 16477 (D. Md. Oct. 20, 1999); *AT&T Communications of the S. Cent. States, Inc. v. BellSouth Telecommunications*, 43 F. Supp. 2d 593 (M.D. La. 1999)). But the first was reversed by the Seventh Circuit. *See MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000) (reviewing consolidated appeals), *petition for cert filed*, 69 U.S.L.W. 3297 (U.S. Oct. 23, 2000) (No. 00-653). The other two are wholly unpersuasive because they failed to recognize that Congress could have preempted the entire field of local competition and denied states any role in this "new federal regime." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 378 n.6. As the vast majority of federal court rulings have recognized, Congress acted properly by permitting (but not requiring) states to participate in this federal program, conditioned on consent to federal court review.

such a waiver must be clear and voluntary. 527 U.S. at 679. *See also Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (there must be an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment"). The Court's particular concern was a form of "constructive waiver" that is effectively indistinguishable from abrogation – *i.e.*, where Congress simply "deems" some ongoing "otherwise permissible" state activity (such as operating a railroad or a college tuition savings plan) to be a waiver. 527 U.S. at 681-83 (discussing *Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U.S. 184 (1964)). To allay that concern, the Court created an irrebuttable presumption that a federal law requiring states to waive immunity in order to be allowed to continue engaging in some "otherwise lawful activity" does not lead to a clear and voluntary waiver. *Id.* at 687 ("[W]e think . . . the point of coercion is automatically passed – and the voluntariness of waiver destroyed – when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.").

But the Court did not bar all waivers effected through voluntary conduct. To the contrary, it ruled that states do validly waive immunity when they knowingly accept a gratuitous federal benefit expressly tied to a waiver. To illustrate the point, the Court distinguished two important cases in which it upheld statutory conditions placed on states by Congress. *Id.* at 686-87. The Court observed that *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), "held that a bistate commission which had been created pursuant to an interstate compact (and which we assumed partook of state sovereign immunity) had consented to suit by reason of a suability provision attached to the congressional approval of the compact." 527 U.S. at 686. It also noted that

South Dakota v. Dole, 483 U.S. 203 (1987), held "that Congress may, in the exercise of its spending power, condition its grant of fund to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." 527 U.S. at 686. The *College Savings* Court explained that, pursuant to the Article I provisions at play in *Petty* and *Dole*, Congress was under no "obligation" to give states the "gratuity" or "gift" obtained, *id.* at 686-87, and that the states, in those cases, were not coerced into waiving their rights in order to engage in "otherwise lawful activity." The cases thus illustrated how valid waivers could occur through acceptance of conditional benefits. *Id.* at 687. *See also Alden v. Maine*, 527 U.S. at 755 ("Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits.").

Here, the Tenth Circuit tracked the Court's discussion of *Dole* and *Petty* in holding that the PSC voluntarily waived its sovereign immunity when the PSC arbitrated the interconnection dispute at the core of this case with clear notice that its action would subject it to federal court review. Pet. App. 29a-31a, 36a-38a. It held that, "[a]s in *Petty* and *Dole*," Congress has "no obligation to allow states to participate in the Act's regulatory scheme." *Id.* at 36a. Congress is just "conditioning a state's ability to regulate" in the areas covered by the Act on being "subject to suit in federal court." *Id.* at 37a-38a.

Petitioners claim that the Act "demands" that states waive their constitutionally protected sovereign immunity. Pet. at 21. They are wrong. Petitioners *voluntarily* accepted Congress's invitation to superintend agreements which are otherwise regulated by the FCC when they "resolved the disputes,"

"directed the parties to prepare interconnection agreements," and "then reviewed and approved the submitted interconnection agreements" in accordance with the Act. Pet. at 14. They certainly were not coerced by a threat of being barred from engaging in an "otherwise lawful activity." Petitioners' participation in the administration of the Act – a "new federal regime," *AT&T Corp.*, 525 U.S. at 378 n.6 – was a "gratuity" that Congress was free to grant (or withhold) at its pleasure. Likewise, the PSC was free to decline that gift and preserve its immunity. The Seventh Circuit, the only other court of appeals to have entered judgment on this question, is in lock-step with the Tenth Circuit on this question. *See MCI Telecommunications Corp.*, 222 F.3d at 345 ("We therefore conclude that the 1996 Telecommunications Act satisfies the requirement that Congress clearly state that participation by the state in the regulatory scheme entails a waiver of immunity from suit in federal court.") (citing decision below).

Nonetheless, petitioners argue that, in arbitrating the disputes among the private parties in this case, it was exercising Utah's traditional police powers to regulate utilities. Pet. at 22. They therefore attempt to frame the question as whether Congress can condition a state's exercise of its police power on exposure to suit in federal court. That position is irreconcilable with this Court's decision in *AT&T Corp.*, which held that the state's traditional powers are preempted where the specific requirements of the Act apply. As the Court noted:

> [T]he question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.

525 U.S. at 378 n.6. For that reason, the Court added, "there is no doubt . . . that if federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Id.*

Petitioners argue that the PSC's role in overseeing interconnection under the Act is merely a continuation of the PSC's historic role in regulating intrastate telecommunications. But the prior existence of Utah laws pertaining to interconnection between local telephone carriers or other regulation of local telephone companies is beside the point. In areas covered by the Act, the governing standards now represent a "new federal regime" in which state commission participation is to be guided by federal law. *Id.* State laws may only apply to the extent they supplement and are consistent with the Act. §§ 252(e)(3), 253.[9]

Moreover, the Act's preemption of inconsistent state law is a *given*, regardless of whether a state chooses to participate in administering the Act's federal standards. *See* § 253(d). Petitioner's argument that the state retains ultimate regulatory authority over interconnection agreements is, therefore, simply without merit. Here again, the Seventh Circuit, the only other court of appeals to have considered the question, is in agreement. *MCI Telecommunications Corp.*, 222 F.3d at 343

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[9] The local competition provisions of the Act concern only one narrow (albeit important) slice of regulation: the terms and conditions of interconnection *between competing phone companies*. *See Puerto Rico Tel. Co. v. Telecommuncations Regulatory Board of Puerto Rico*, 189 F.3d 1, 8, 12-13 (1st Cir. 1999). States, therefore, retain the regulatory powers over local telephone service that they may choose to exercise outside the sphere of interconnection agreements, including any power under state law to regulate the terms and conditions under which telephone companies offer local service to subscribers. *See* § 253(b); *Puerto Rico Tel.*, 189 F.3d at 12.

("It is clear that Congress, in exercising its Commerce Power, could determine that all regulation of the telecommunications industry ought to be entrusted to the federal government. And with the 1996 Telecommunications Act, we believe it equally clear that Congress did take over some aspects of the telecommunications industry.") (citations omitted).

Having chosen to impose federal standards and procedures, Congress also was within its rights in offering states the chance to participate as regulators only if they agreed to apply the federal standards and procedures. Under the Tenth Amendment, that is a choice Congress can impose, even in matters previously subjected to state police-power regulation. *See FERC v. Mississippi*, 456 U.S. 742, 761-71 (1982) (utility regulation); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288-89 (1981) (land use). The only question presented here is whether Congress may also make the perfectly reasonable decision that states choosing to participate should have their compliance with federal law reviewed in federal court. *College Savings*, far from precluding that decision, directly authorizes it.[10]

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[10] Even if the Court were inclined to review the questions presented, this case would not be an ideal candidate. As discussed above, the PSC defendants' legal position has been far from consistent. Indeed, they stipulated that MCI, one of the two plaintiffs in consolidated cases, could sue them in federal court *See* pp. 4-5 *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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